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Supreme Court of the United States.

OCTOBER TERM, 1949.

No. 108.

ELMER H. BARTLETT ET AL.,
PETITIONERS,

v.

DENIS W. DELANEY, COLLECTOR, ET AL.,
RESPONDENTS.

PETITIONERS' REPLY BRIEF.

EDWARD C. THAYER,
Attorney for Petitioners.

E. BARTON CHAPIN,
KENNETH W. BERGEN,
Of Counsel.

ADDISON C. GETCHELL & SON, LAW PRINTERS, BOSTON.

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PETITIONERS' REPLY BRIEF.

1. *Hart Furniture Co., Inc.,* v. *Commissioner,* 12 T.C., No. 147, promulgated June 21, 1949. We respectfully call attention to the above decision, promulgated subsequent to the filing of the petition for certiorari, as illustrating the confusion in the cases dealing with erroneous deductions, and indicating that *Cooperstown Corporation* v. *Commissioner,* 44 F. (2d) 693; certiorari denied 323 U.S. 772, is in conflict with the decision below as we assert. In *Hart Furniture Co.* the company claimed as a deduction in 1945 the full amount of its social security taxes without availing itself of the 90% credit for contributions to the state unemployment compensation fund.

> "Not through design, but through error, petitioner, upon filing its excise tax return, failed to avail itself

of the credit to which it was then entitled, all conditions thereto having presumably been met. As a result its ultimate federal excise tax liability was erroneously overstated by about 90%, and, upon claim by petitioner, this erroneous overpayment was ultimately refunded to it in 1946. Petitioner contends that since it actually did pay $856.99 in order to meet its supposed excise tax liability, though conceding the amount was erroneous, it should be permitted to deduct that amount. Respondent on the other hand, argues that petitioner's deduction should be limited to the amount of its definitely ascertainable actual excise tax liability, i.e., the difference between $856.99 and $766.54, the amount ultimately refunded to petitioner.

"In our judgment, respondent's conclusion must be upheld. We believe the disposition of this issue in respondent's favor is compelled by *Cooperstown Corporation* v. *Commissioner,* 144 F. (2d) 693; certiorari denied 323 U.S. 772."

In the opinion reference is made to the decision below, and it is stated:

"In the *Bartlett* case, the payment of the tax, later refunded, was made pursuant to a determination of the Commissioner, and Chief Judge Magruder, writing the opinion on behalf of the First Circuit, recognized 'that the *Cooperstown* case is narrowly distinguishable on its facts.' "

2. We reiterate that *Cooperstown* is in conflict. The only grounds for distinction are that in *Cooperstown* and *Hart* the deduction was in respect of a tax overstated by the taxpayer, while in our case the overpayment was with respect to a tax erroneously determined by the Commis-

sioner. The *Cooperstown* case, we submit, does not rely on any such distinction, nor does the opinion below, R. 70. Such a distinction is pointless to the proper administration of the tax laws, when the question involved is one of substantive law, namely, what is the net income of the taxpayer for the period? See opinion of Frankfurter, J., in *Ross* v. *Commissioner,* 169 F. (2d) 483, 492 (C.A. 1st, 1948).

It is futile merely to assert, as does the opinion below, R. 70, and the brief in opposition, p. 10, that the cases are "narrowly distinguishable" or "distinguishable" without pointing out any distinction except a vague reference to reasons stated by the government in opposing the petition for certiorari in the *Cooperstown* case.

Respectfully submitted,

EDWARD C. THAYER,
Attorney for Petitioners.

E. BARTON CHAPIN,
KENNETH W. BERGEN,
Of Counsel.